

Clause 4.6 Variation

Subdivision Development Application

21 Middleton Road, Cromer, NSW 2099

Prepared by Ethos Urban

Submitted for Ausgrid on behalf of
Alpha Distribution Ministerial
Holding Corporation (ADMHC)

16 December 2024 | 2240468



'Gura Bulga'

Liz Belanjee Cameron

'Gura Bulga' – translates to Warm Green Country. Representing New South Wales.



'Dagura Buumarri'

Liz Belanjee Cameron

'Dagura Buumarri' – translates to Cold Country. Representing Victoria.



'Gadalung Djarri'

Liz Belanjee Cameron

'Gadalung Djarri' – translates to Hot Red Country. Representing Queensland.

Ethos Urban acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture.

We pay our respects to their Elders past, present and emerging.

In supporting the Uluru Statement from the Heart, we walk with Aboriginal and Torres Strait Islander people in a movement of the Australian people for a better future.

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Appendix	Author
A. Plans of Subdivision	Ausgrid

1.0 Introduction

1.1 Overview

This Clause 4.6 variation request has been prepared by Ethos Urban for Ausgrid on behalf of Alpha Distribution Ministerial Holding Corporation (ADMHC) the proponent / applicant). It is submitted to Northern Beaches Council (Council) in support of a Development Application (DA) for the paper subdivision of land known as 21 Middleton Road, Cromer, NSW 2099 (the site).

Clause 4.6 of the *Warringah Local Environmental Plan 2011 (WLEP)* enables the consent authority to grant consent for a development, even though that development contravenes a development standard. This Clause 4.6 Variation Request relates to the minimum lot size of proposed Lot 1 and should be read in conjunction with the Statement of Environmental Effects (**SEE**) prepared by Ethos Urban dated 20 November 2024. This DA seeks approval for the subdivision of Lot 6 DP 771621 into two Torrens Title lots, comprising:

- Lot 1 (1,580m²) containing the existing substation.
- Lot 2 (2.68ha) containing the remaining surplus land.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying certain development standards, and to achieve better outcomes for and from development by allowing flexibility in particular circumstances. Clause 4.6(3) requires that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances (Clause 4.6(3)(a)), and
- There are sufficient environmental planning grounds to justify the contravention of the development standard (Clause 4.6(3)(b)).

This document demonstrates that compliance with the minimum lot size is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the development standard. As such, this document satisfies the provisions of Clause 35B(2) of the *Environmental Planning and Assessment Regulation 2021 (EP&A Regulation)*.

This Clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the development standard, the proposed development:

- Achieves the objectives of the minimum subdivision lot size for E4 zoned land notwithstanding the non-compliance since the development application seeks consent for paper subdivision only and no physical works are proposed therefore it maintains the industrial character of the land.
- Demonstrates that there are sufficient environmental planning grounds to support the variation, including that:
 - The variation responds to the site zoning and reflects the highest and best use of the land;
 - The variation will result in a subdivision outcome that is consistent with the surrounding area, the objectives of other controls applying to the site and previous approvals. The variation is of a scale that is consistent with the site's location and locality; and
 - The variation does not result in any additional impacts to surrounding properties.
- The underlying objective or purpose of the standard is no longer relevant to the development and therefore compliance is unnecessary; and
- The contravention is in the public interest since it will enable the continued operation of the operational electrical substation by Ausgrid and the suitable release of other surplus land for alternate uses within the E4 zoning, which is considered to be in the public interest.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under Clause 4.6 of The WLEP. It is also of note that under the *Environmental Planning and Assessment Act 1979 (EP&A Act)*, s4.33(1), a consent authority must not:

- a) Refuse its consent to a Crown development application, except with the approval of the Minister, or
- b) Impose a condition on its consent to a Crown development application, except with the approval of the applicant or the Minister.

2.0 Development Standard to be Varied

2.1 Relevant Development Standard

This clause 4.6 variation request seeks to justify contravention of the development standard set out in Clause 4.1 Minimum subdivision lot size of the WLEP 2011. Clause 4.1 provides that the size of any lot resulting from subdivision of land is not to be less than the minimum size shown on the Lot Size Map in relation to that land. The minimum size as shown on the Lot Size Map for the subject site is 4000sqm. An extract from the Lot Size Map is provided at **Figure 1**.

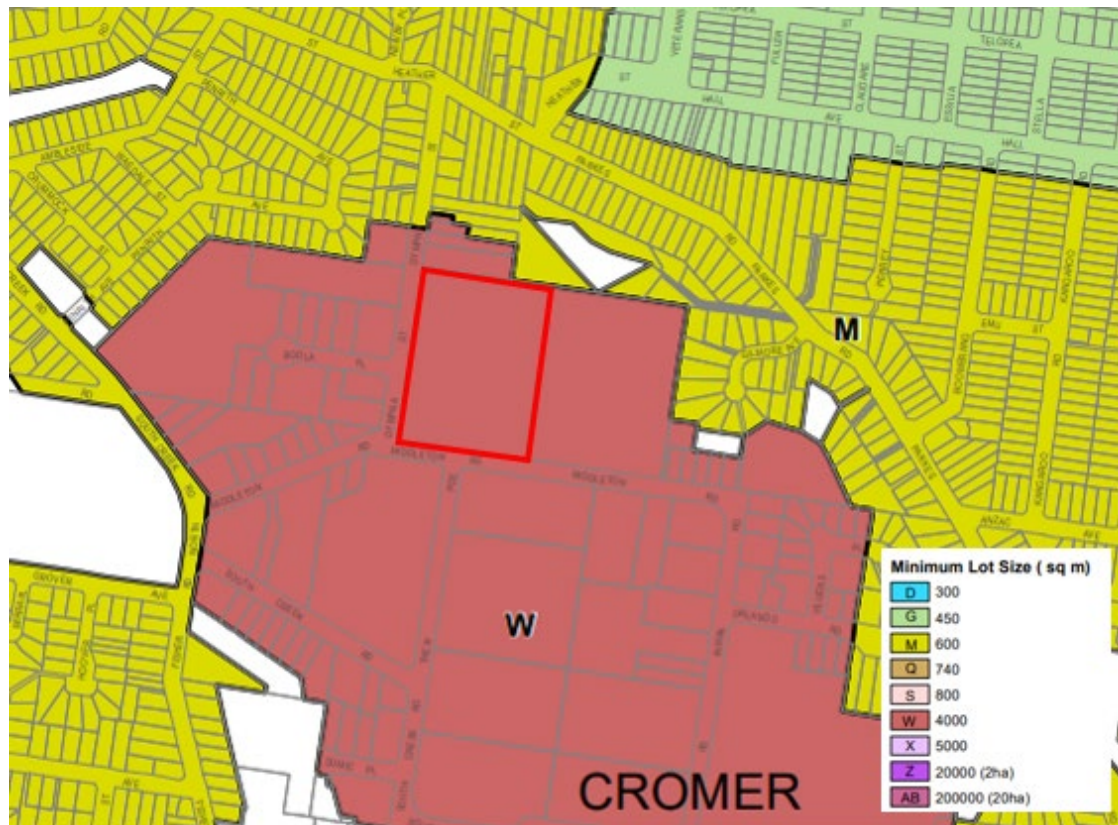


Figure 1 Minimum Lots Size Map

Source: Warringah LEP 2011, edited by Ethos Urban

The proposed development seeks consent for the paper subdivision of the land into two (2) separate lots, comprising:

- Lot 1 (1,580m²) containing the existing substation.
- Lot 2 (2.68ha) containing the remaining surplus land.

The proposed subdivision plan is provided at **Figure 2** below.

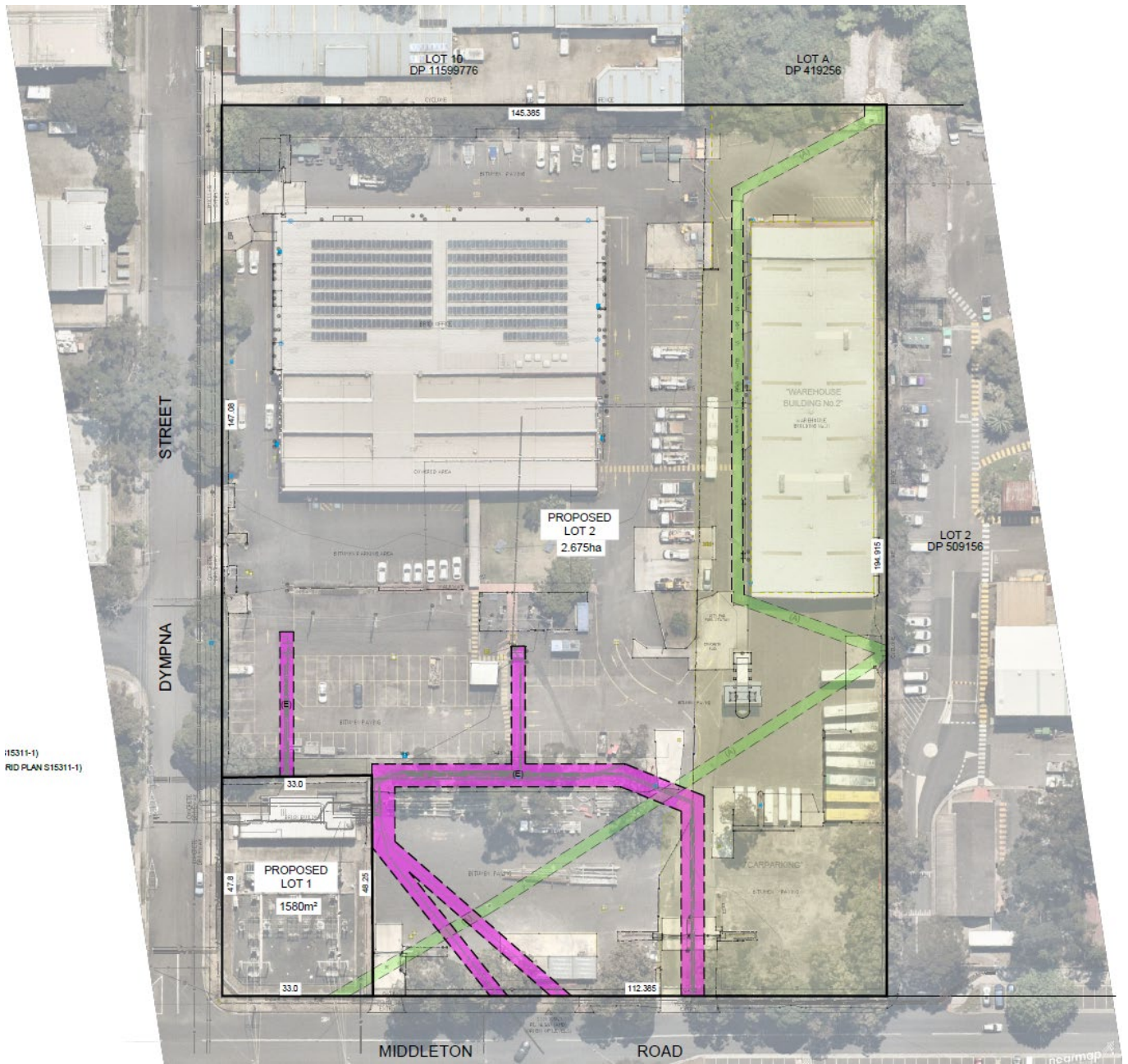


Figure 2 Proposed Subdivision Plan

Source: Ausgrid

2.2 Is the planning control in question a development standard

'Development Standards' are defined under Section 1.4(1) of the *Environmental Planning & Assessment Act 1979* (EP&A Act) as follows:

“development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...

(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point...

The minimum subdivision lot size is a development control under Clause 4.1 of the Warringah LEP 2011 is therefore a development standard.

2.3 Variation Sought

The proposed development seeks consent for the paper subdivision of the land into two (2) lots, comprising:

- Lot 1 (1,580m²) containing the existing substation.
- Lot 2 (2.68ha) containing the remaining surplus land.

One of the lots is proposed to be less than the minimum lot size (4,000m²) shown on the Lot Size Map in relation to that land, specifically Lot 1 with a proposed area of 1,580m². This Clause 4.6 request therefore seeks a proposed variation to the minimum lot size of 60.5%.

3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Warringah LEP 2011 provides that:

4.6 Exceptions to development standards

(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

(a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827.
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action).
4. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (Al Maha).
5. *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511.
6. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386.
7. *Moskovich v Waverley Council* [2016] NSWLEC 1015.
8. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552 (Baron Corporation).

The relevant matters contained in Clause 4.6 of the Warringah LEP, with respect to the Clause 4.1 development standard, are each addressed below, including with regard to these decisions.

3.1 Role of the consent authority

The role of the consent authority in considering a request for a Clause 4.6 variation has been recently explained by the NSW Court of Appeal in *Initial Action* and in *Al Maha* to require that the consent authority needs to be satisfied in relation to two matters:

- That the applicant's request has adequately addressed the matters in Clause 4.6(4)(a)(i); and
- That the proposed development will be in the public interest because of its consistency with the objectives of the development standard and the zone objectives.

The consent authority is required to form these two opinions first before it considers the merits of the DA and it can only consider the merits of the DA if it forms the required satisfaction in relation to the matters. In particular, the Council needs to be satisfied that there are proper planning grounds to grant consent and that the contravention of the standard is justified. This report provides the basis for the Council to reach this level of satisfaction.

This report provides the basis for the consent authority to reach the required level of satisfaction.

The relevant matters contained in Clause 4.6 of the Warringah LEP, with respect to the Minimum Lot Size development standard, each are addressed below, including with regard to the above decisions.

3.2 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under Clause 4.6 where sub-Clause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the Warringah LEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this Clause 4.6 variation request.

The five methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
- The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (**Fourth Method**).
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

Of particular assistance in this matter in establishing that compliance with a development standard is unreasonable or unnecessary is the **First Method** and the **Second Method**.

3.2.1 First Method: The objectives of the standard are achieved notwithstanding non-compliance with the standard

The objectives of the development standard contained in Clause 4.1 of the WLEP are:

- (a) to protect residential character by providing for the subdivision of land that results in lots that are consistent with the pattern, size and configuration of existing lots in the locality,
- (b) to promote a subdivision pattern that results in lots that are suitable for commercial and industrial development,
- (c) to protect the integrity of land holding patterns in rural localities against fragmentation,
- (d) to achieve low intensity of land use in localities of environmental significance,
- (e) to provide for appropriate bush fire protection measures on land that has an interface to bushland,
- (f) to protect and enhance existing remnant bushland,
- (g) to retain and protect existing significant natural landscape features,
- (h) to manage biodiversity,
- (i) to provide for appropriate stormwater management and sewer infrastructure

Objective (a): to ensure minimum lot sizes are appropriate for the zones to which they apply and for the land uses permitted in those zones

As described in **Section 2.3** above, the land subject to this variation contains the existing Ausgrid electrical substation. The land:

- is not identified as being of or does not contain any items of ecological significance;
- can still allow for the Ausgrid electrical substation to function efficiently despite the variation; and
- will still be efficiently utilised for employment generating uses while being consistent with the E4 General Industrial zone objectives.

The subdivision of this land will not negatively impact the level of safety for adjoining land or neighbouring properties. While the subdivision will result in proposed Lot 1, which contains the substation, being less than the 4,000m² minimum lot size, it will not undermine the ability of the substation to continue to operate. The proposed

variation, although a numerically large deviation from the control is not unreasonable as it will allow for better use of the site.

Objective (b): to ensure minimum lot sizes reflect the outcomes of any adopted settlement strategy for Northern Beaches

The proposed seeks consent for paper subdivision only and is consistent with Priority 28 set out in the Northern Beaches Local Strategic Planning Statement. The application does not propose any physical works, nor does it propose to change the site's zoning or current land use, therefore not contributing to fragmenting the industrial land. The statement also notes that Northern Beaches LGA has the lowest amount of Industrial land in Greater Sydney and that demand is growing. The DA for paper subdivision would make more industrial land available by freeing up surplus land (proposed Lot 2) to be utilised in the future and meet the needs of growing demand.

3.2.2 Second Method: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary

This Minimum Lot Size requirement precludes a significant number of the permitted land uses of the E4 land that would otherwise be delivered. Thus, the relationship between the zoning and Minimum Lot Size control is rigid and does not provide a reasonable degree of flexibility to enable future proposed land uses. As discussed above, the proposed Lot 1 that would contain the substation would continue to operate into the future and the lot size does not impact its ability to operate. The other land that is subject to this variation is surplus to the needs of the existing substation infrastructure and is otherwise consistent with the objectives of the E4 General Industrial Zone.

There would be no merit in strictly applying the Minimum Lot Size controls, and conversely, any proposal which sought to do so would result in the continued underutilisation of land within an E4 zone, and reduction in delivery of employment opportunities to the local area.

3.2.3 Conclusion on Clause 4.6(3)(a)

As outlined above, compliance with Clause 4.1 – Minimum subdivision lot size in the WLEP 2011 as it relates to the proposed development is considered to be unreasonable and unnecessary since:

- The proposal offers the opportunity for a more efficient use of the land than its current state;
- The objectives of Clause 4.1 are achieved and the objectives of the E4 zone are achieved notwithstanding the variation; and
- As there are no physical works proposed the variation will not result in any adverse or negative impacts to the site itself or surrounding land.

3.3 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the WLEP 2011 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole.

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 Variation Request must be particular to the circumstances of the proposed development on that site. In this instance, the relevant aspect of the development is the proposed reduction in the minimum lot size applicable to proposed Lot 1 of the proposed development. There are sufficient environmental planning grounds to justify contravention of the minimum subdivision lot size (Clause 4.1) in this specific instance, as described below:

3.3.1 3.3.1 Ground 1: The variation responds to the site zoning and reflects the highest and best use of the land.

- The variation provides for a more appropriate use of the site, which is currently underutilised. The current control does not allow for a reasonable level of flexibility for other development that is permitted with consent on the land and results in a rigid relationship between the two controls. The proposed subdivided lots would still be able to cater for the E4 land zone objectives, as proposed Lot 2 would exceed the minimum lot size standard (at 2.68 ha) and Lot 1, which contains the substation, would continue to function on the required operational land.

- The proposed subdivision would enable the surplus land within the site (being proposed Lot 2) to be utilised for other future uses within the E4 zoning, representing the highest and best use of the land.

3.3.2 Ground 2: The variation will result in a subdivision outcome that is consistent with the surrounding area, the objectives of other controls applying to the site and previous approvals.

- The proposed paper will does not seek consent for any physical works. No works or development is proposed and there will be no changes to the site and its current state.
- The proposed subdivided lots will remain consistent with the surrounding area and neighbouring sites, being regular in shape and with appropriate access and serviced maintained.

3.3.3 Ground 3: The variation does not result in any additional impacts

- The DA seeks consent for paper subdivision only, with no physical works proposed. Therefore, the variation will not result in any amenity issues or have any impact on the site beyond its existing operation.

3.3.4 Conclusion on Clause 4.6(3)(b)

Overall, the proposed variation to the minimum lot size control does not result in any unacceptable impacts on adjoining sites. There are no environmental planning grounds that warrant maintaining and/or enforcing the numerical minimum lot sizes as stipulated under Clause 4.1 for the site.

There are sufficient environmental planning grounds to support contravention of the development standard in this circumstance, including:

- The variation reflects the highest and best use of the land.
- The variation will result in a subdivision outcome that is consistent with the surrounding area, the objectives of other controls applying to the site and previous approvals. The variation is of a scale that is consistent with the site's location and locality.
- The variation does not result in any additional impacts to surrounding properties.

3.4 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

3.4.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of Clause 4.1 development standard, for the reasons discussed in **Section 3.2.2** of this report.

3.4.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the E4 General Industrial zoning that applies to the site, as demonstrated below.

Objective (a): To provide a range of industrial, warehouse, logistics and related land uses.

The subject application seeks consent for paper subdivision of the land only, there are no physical works proposed as part of this DA. The subdivision will allow the release of surplus land for future occupation for a range of permissible uses within the E4 zoning.

Objective (b): To ensure the efficient and viable use of land for industrial uses.

The subdivision will ensure the continued future efficient and viable use of the land for industrial uses.

Objective (c): To minimise any adverse effect of industry on other land uses.

The subject application seeks consent for paper subdivision of the land only, there are no physical works proposed therefore no adverse effects on other uses would arise.

Objective (d): To encourage employment opportunities.

The proposed paper subdivision of the site will provide for a more appropriate use of the site, which is currently underutilised land surplus to the substation operational requirements. It will provide the opportunity for the site to be used for a wider range of industrial activities, which will lead to future employment opportunities.

Objective (e): To enable limited non-industrial land uses that provide facilities and services to meet the needs of businesses and workers.

The future subdivided site could facilitate limited non-industrial uses that meet the needs of businesses and workers.

Objective (f): To provide areas for land uses that need to be separated from other zones.

The future subdivided site could facilitate could provide areas for land uses that need to be separated from other zones, subject to a future development application.

Objective (g): To provide healthy, attractive, functional and safe light industrial areas.

The subject application seeks consent for paper subdivision of the land only, there are no physical works proposed as part of this DA and the site will remain unchanged.

3.4.3 Overall public interest

The proposal is in the public interest as it:

- The proposed subdivision will provide flexibility for the future use, operation and ownership of land which is surplus to Ausgrid requirements.
- The proposed subdivision does not include any physical works and will not generate any negative impacts.
- The better utilisation of the land may bring about future employment opportunities creating positive social and economic benefits for the local community.

3.4.4 Conclusion on clause 4.5(4)(a)(ii)

The proposed variation is in the public interest as it is consistent with the objectives of the zone and development standard, as described above. The variation will allow the opportunity for the land to be better utilised, however as there are no physical works proposed at this time it will not generate any negative impacts.

4.0 Conclusion

The assessment above demonstrates that compliance with the minimum lot size development standard contained in Clause 4.1 of The WLEP is unreasonable and unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify the contravention. It is considered that the variation could allow for the orderly and better use of the land in an appropriate manner and will also not create any adverse impacts.

This Clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the minimum lot size development standard, the proposed development:

- The variation achieves the objectives of the minimum subdivision lot size development standard notwithstanding non-compliance;
- Demonstrates that there are sufficient environmental planning grounds to support the variation;
- Is in the public interest; and
- Is consistent with Northern Beaches Council strategic planning policies and does not raise any matter of significance for State or regional planning.

Therefore, the consent authority can be satisfied that this Clause 4.6 Variation Request has demonstrated the matters in Clause 4.6(3) of the Warringah LEP and may grant development consent notwithstanding the contravention of the minimum lot size development standard.